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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-

ROAN SELECTION TRUST LIMITED and
AMERICAN METAL CLIMAX, INC.,

Petitioners,

—against—

HAROLD E. KOHN, Trustee, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered March 31, 1972.

Opinions Below

The opinion of the Court of Appeals is reported at 458 F.2d 255. Judge Adams' dissenting opinion appears in 458 F.2d at 270. The opinions of the District Court are reported at 313 F. Supp. 1251 (E.D. Pa. 1970) and 322 F. Supp. 1331 (E.D. Pa. 1970).

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1972, and its further order denying a petition for rehearing was entered on April 27, 1972. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. After a hearing of which all shareholders (including respondent) of a Zambian corporation had due notice, and at which they had the right to appear and be heard in person or by counsel, the High Court of Zambia entered its decree directing consummation of a reorganization of the corporation. The court held that the reorganization was fair to all the corporation's shareholders and, implicitly, that the reorganization had been properly approved by a shareholder vote after disclosure of all material facts. The judgment of the High Court of Zambia is final and immune under Zambian law from collateral attack by shareholders on any basis, including claims of fraud and inadequate disclosure such as those asserted in this action by respondent. Under these circumstances, may a United States District Court in an action brought under the Securities Exchange Act of 1934[1] entertain a collateral attack upon the Zambian judgment and order revision of the reorganization directed by the Zambian court?[2]

2. Assuming that such a collateral attack upon the judicially-decreed reorganization of a Zambian corporation can be maintained in the United States at all, can the corporation and others who participated in the preparation of an explanatory statement distributed to its shareholders in connection with its reorganization be held—despite the ex-

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[1] Hereafter the "Exchange Act."

[2] Petitioners, against whom the judgment below was entered, have sought review within 90 days after denial of their petition for rehearing below. The respondent shareholder, who did not petition for rehearing below, has filed his petition for certiorari within 90 days of the entry of judgment. (No. 72-5, filed June 29, 1972) The petition in No. 72-5 presents for review only the far narrower question of whether the Zambian judgment barred re-examination of the fairness of the terms of the reorganization. We do not oppose that petition.

press exemption of such a statement from American proxy rules by SEC Rule 3a12-3(b)—to have violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, where, in addition,

(a) the alleged deficiencies in such statement did not involve fraudulent or advertent misconduct, and

(b) the alleged deficiencies, which were not in any event material, were called to the attention of the shareholders in a separate document, which was prepared by respondent as shareholder class representative and distributed with the statement?

3. Assuming that such a collateral attack may be maintained and that liability may be found under these circumstances, does *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), obligate a federal court to enter a decree which revises a corporate reorganization effected by order of the court of competent jurisdiction in the corporation's domicile?

Statutes Involved

Pertinent portions of Sections 14, 15, 16, 17, 18, 19 and 104 of the Zambia Companies Ordinance (ch. 216, Laws of Zambia, 1965) and of Sections 3, 10 and 14 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78c, 78j and 78n, Rules 3a12-3 and 10b-5 promulgated thereunder, 17 C.F.R. §§ 240.3a12-3 and 240.10b-5, SEC Form 20, 17 C.F.R. § 249.220, and Section 27 of the Exchange Act, 15 U.S.C. § 78aa, are set forth in the Appendix to this petition, pages A-6 to A-14, *infra.*

Two orders of the High Court of Zambia implementing the applicable provisions of the Zambia Companies Ordinance also are reproduced in the Appendix, pages A-1 to A-5, *infra.*

Statement of the Case

Petitioner Roan Selection Trust Limited ("RST") is a Zambian corporation founded over forty years ago in what was then the British colony of Northern Rhodesia and managed throughout its existence by British subjects.[3] Prior to the nationalization by which Zambia obtained 51% of its mining business and which bred the present controversy, RST's headquarters were in Zambia, and substantially all of its income was derived from the mining and refining of copper in Zambia and its sale to Europe and Japan. Petitioner American Metal Climax, Inc. ("Amax") is a New York corporation which owned 42.3% of RST's common shares.

RST's capital initially was raised abroad; and while a majority of its publicly-held equity had gradually been purchased by Americans, approximately eight million shares were held outside the United States. RST's shares were traded on stock exchanges in London, Paris, Brussels and Johannesburg; and American Depositary Receipts were traded on the New York Stock Exchange.

The facts which are critical for present purposes were summarized by Judge Adams in his dissenting opinion below:

> "Despite public and private assurances that Zambia had no intention of nationalizing the copper industry, the Government steadily acquired a number of the country's industrial and commercial companies. Then, in 1969, by the Matero Declaration, the President of Zambia announced his Govern-

[3] RST was incorporated in England in 1928 under the name Rhodesian Selection Trust Limited, and the company was reincorporated in Northern Rhodesia in 1954. When Zambia achieved its independence in 1964, RST changed its name to Roan Selection Trust Limited.

> ment's desire to acquire control of all the operating copper properties in Zambia for 'fair value represented by book value.' It immediately became clear that the Zambian Government was desirous of having this nationalization appear to be voluntary. Thus, the management of RST was able to negotiate and to extract, in addition to the sale price for 51% of RST's operating assets, two important concessions as the quid pro quo for the appearance of voluntariness: the authorization for RST to externalize its remaining assets so that they would be free from Zambian exchange controls, and the right to defer nationalization until its terms were approved by the RST shareholders. This last provision provided time in which RST could arrange to implement the externalization of its assets." (App. 28-29)[4]

Following agreement with Zambia upon the terms of nationalization, RST's management proceeded immediately to ascertain the best available means of externalization (i.e., the removal of the company and its remaining assets from Zambia), so that externalization could be accomplished simultaneously with nationalization. RST's board of directors and its professional advisors concluded that the best available mode of externalization would be a corporate reorganization under Zambian law whereby, after notice to and approval by RST's shareholders and confirmation by the High Court of Zambia, certain of RST's assets would, in effect, be received pro rata by its shareholders. Shareholders other than Amax would receive, in addition, debentures and warrants issued by Amax in consideration for their interests in the remaining RST assets, and RST would "amalgamate" with Amax. The

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[4] Appendix citations (App.) refer to the two-volume Appendix filed by petitioners Harold E. Kohn, et al., in No. 72-5. *See* note 2, page 2, *supra*.

board and its advisors considered that this course preserved values to the fullest extent possible for all shareholders.

As Judge Adams said:

> "Because of the circumstances, nationalization, externalization and amalgamation in fact constituted only one transaction. On August 11, 1969, the Government of Zambia announced that the operating properties of RST would be nationalized and that Zambia would acquire 51% of these assets. It was subsequently discovered that the fair price Zambia had in mind would have returned to the shareholders only about 50% of the book value of the assets they would lose. The non-operating assets of RST consisted mainly of cash, which Zambia coveted in order to bolster its economy. Zambia's intense interest in keeping this cash within Zambia was manifested by the currency exchange controls and the limitation on the payment of dividends to foreign shareholders it had previously invoked. It was obvious that to retain these assets in Zambia would create a serious risk of further nationalization. Even without this risk, RST was severely hampered in its ordinary international operations by these restrictions. Therefore, RST's management concluded that the only possible course of action to follow after nationalization was externalization.
>
> "The desire of the Zambian Government to have the nationalization appear voluntary provided the opportunity to secure permission to externalize. In this regard, RST persuaded Zambia to defer nationalization until its shareholders approved, although Zambia would have preferred otherwise. This concession could not be deemed open-ended, or RST would have been able to postpone nationalization

indefinitely. However, it did provide a breathing spell during which RST could formulate a plan for externalization.

"The testimony in the district court by Sir Ronald Prain, Chairman of RST, Ian MacGregor, Chairman of AMAX, and Robert Page, a director and vice-president of RST, dramatically illustrated the plight of RST; how they were taken by surprise by the Matero Declaration because it represented a reversal of policy of the Government; the urgency with which they had to act: the reasons for deferring nationalization until the shareholders approved; the crippling effect of the Zambian currency restrictions; and the disastrous consequences which would result from remaining in Zambia after nationalization. They further testified that if the shareholders voted against nationalization, the entire transaction would have to have been renegotiated with Zambia, and that less favorable results would probably have been obtained the second time around. This testimony was internally consistent, was never contradicted, and the trial judge in his findings in no way questioned it." (App. 65-67)

The terms of the corporate reorganization and externalization were publicly announced in summary form on March 6, 1970, and RST's shareholders were advised that explanatory materials seeking their approval would be distributed shortly. While explanatory materials were in the course of preparation, RST also commenced the necessary proceeding under the Zambia Companies Ordinance to submit the reorganization to the scrutiny of the High Court of Zambia, which alone was empowered to effectuate it.[5]

[5] The High Court of Zambia is a trial court of general jurisdiction. Constitution of Zambia, Ch. 7, Art. 98 (1964). Its jurisdiction parallels that of the High Court of Justice in England. *See M/S Bremen v. Zapata Off-Shore Co.*, No. 71-322 (June 12, 1972).

Under English law, which has been continued in this respect without change in Zambia since its independence, the reorganization was in form a "reduction of capital." A judgment approving a reduction of capital after the appropriate shareholder vote must be based upon the court's holding that the reduction is fair and that a valid vote has been taken after proper disclosure. All shareholders of the corporation are summoned to appear in the proceeding, have the right to be heard in person or through counsel, and are bound by its result.[6] The process is analogous to judicially-controlled reorganizations in this country, such as those conducted pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79, *et seq.*

Subsequent to the announcement of agreement with Zambia on the terms of nationalization, respondent purchased shares in RST; and after the plans for a reorganization were made public, he brought a class action in the United States District Court for the Eastern District of Pennsylvania which raised the very issues which were to come before the Zambian court: the fairness of the reorganization and the adequacy of disclosure to shareholders. Respondent charged that no proper vote could be taken in Zambia, because disclosure to American shareholders violated Section

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[6] The role of the modern reduction of capital proceeding as a safeguard of fairness to all shareholders as well as creditors was established in the House of Lords as early as 1894. *British and American Trustee and Finance Corp. Ltd. and Red. v. Couper* [1894] A.C. 339 (H.L.). The Order of the High Court of Zambia dated June 9, 1970, which set August 14, 1970, as the date for the final hearing on RST's petition to confirm its reduction of capital, expressly directed that ". . . any creditor or shareholder of the said Company who desires to object may attend and be heard. . . ." This order, which was printed in RST's Explanatory Statement sent to each shareholder (*see* note 8, page 10, *infra*), is set forth in the Appendix to this petition, pages A-1 and A-2, *infra*.

10(b) of the Exchange Act and Rule 10b-5, and that the terms of the proposed reorganization were unfair to RST's public shareholders.[7]

On June 8, 1970, the District Court denied respondent's motion for a preliminary injunction, noting that explanatory materials describing the complex transaction were still in the process of preparation and that the reorganization would require the approval of two-thirds of the voting shareholders, the further approval of a majority of RST's voting shareholders other than Amax, and a finding by the High Court of Zambia that the reorganization was "equitable to all shareholders." (App. 136-37)

Thereafter, on the eve of distribution of the completed explanatory materials, respondent moved a second time in the District Court for a preliminary injunction. This time the injunction was conditionally granted unless the materials included a letter prepared by respondent setting forth his position as class representative concerning the proposed reorganization. Respondent's letter urged shareholders to reject the reorganization, detailed the particulars in which he claimed the company's materials to be misleading, and assailed the whole plan as unfair and fraudulent.

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[7] As a foreign corporation whose business was not administered principally in the United States and which did not have a majority of United States resident directors, RST was exempted by Securities and Exchange Commission regulation from compliance with American proxy rules enacted pursuant to Section 14 of the Exchange Act. Exchange Act Rule 3a12-3(b), 17 C.F.R. § 240.3a12-3(b); SEC Form 20, 17 C.F.R. § 249.220. The decisions below completely disregard this exemption by deciding the case as through the proxy rules were applicable to RST's explanatory materials.

The explanatory materials,[8] together with respondent's letter, were mailed in early July, and the RST shareholder vote was held August 6, 1970. Respondent's position was overwhelmingly rejected and the reorganization approved by a vote of all shareholders and a separate vote of the non-Amax shareholders.

As the shareholders had been advised in the explanatory materials, the Zambian court proceeding required to effect the reorganization had already been commenced; assuming shareholder approval on August 6, there was to be a hearing before the High Court on August 14. Respondent and all other shareholders had been advised both by mail in the explanatory materials and in addition by worldwide publication of their right to attend and be heard by the court. They were also informed that the Zambian court's determination would be final and binding upon each of them.

Following shareholder approval on August 6, but before the High Court hearing set for August 14, the District Court enjoined participation by RST or Amax in the Zambian proceeding. That injunction was promptly stayed by the Court of Appeals, and the hearing went forward as scheduled. Although respondent did not appear in the Zambian court—even though the District Court had urged him to do so[9]—the High Court had before it the entire

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[8] The materials distributed by RST to accompany its form of proxy followed English custom in form and structure and hence were entitled "Explanatory Statement." The Joint Appendix in the court below, a copy of which will be filed in this Court, contains a set of the materials distributed as a separate Volume II of the Exhibit Volumes. Respondent's letter appears therein at page E-21.

[9] The District Judge suggested on August 5, 1970—nine days before the Zambian court's hearing—that the respondent give "serious consideration" to appearing there and addressing his allegations to that court. *See* Joint Appendix below at 721a.

record in the District Court and the Court of Appeals, including respondent's letter to the RST shareholders asserting unfairness to them and the supposed disproportionate benefits to Amax. All of respondent's contentions of gross unfairness and misrepresentation were presented to the Zambian court more than a week in advance of the hearing.[10]

After the evidentiary hearing held on August 14, the High Court of Zambia confirmed the reorganization, thereby determining the terms to be fair and the shareholder vote to have been valid in all respects, including the sufficiency of the explanatory materials.

The High Court directed RST to register the judgment of confirmation (App. 246-48; pages A-3 to A-5, *infra*); when this was done on August 15, 1970, the reduction of capital was completed, all of RST's publicly held shares were cancelled by operation of law, and the public shareholders became irrevocably entitled to the assets, including Amax debentures and warrants, which were distributed in cancellation of their shares. Under Zambian law, the RST share certificates held by the public shareholders thereupon evidenced only the rights pertaining thereto under the

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[10] The Justice of the High Court of Zambia who presided over the RST reorganization proceeding was the Honorable S. W. Magnus, the author of a leading English treatise on corporation law which was cited by the District Court in its denial of respondent's first motion for a preliminary injunction. (App. 131) Mr. Justice Magnus was called to the bar at Grays Inn, practiced as a barrister in London, and served in the territorial legislature of Northern Rhodesia prior to Zambian independence and later in the National Assembly of Zambia. Before his elevation to the bench, Mr. Justice Magnus was appointed Queen's Counsel. Apart from his treatise on corporation law, he is a contributor to *Halsbury's Laws of England* and the author of a number of works on other legal subjects. (App. 90, n. 65; *see* Joint Appendix below at 1009a)

reorganization decree. No appeal was taken by any shareholder.

Despite the Zambian judgment, the District Court rejected petitioners' summary judgment motion and permitted respondent to continue his action, which was then a collateral attack on the reorganization. The District Court went on to hold after trial that the very reorganization approved by the Zambian court as fair was unfair to RST's shareholders under Zambia's own law and that the shareholder vote, also previously upheld, was improper because of inadequate disclosure in RST's explanatory statement. Even though the reorganization had been completed by order of the Zambian court and Zambia had acquired 51% of RST's operating assets, the District Court ordered Amax in effect to offer each of RST's former public shareholders the option of rescinding the cancellation of his shares.

The Court of Appeals in large part reversed the District Court, holding that the Zambian court's judgment foreclosed collateral inquiry into the fairness of the reorganization and that many of the findings of proxy material misstatement were clearly erroneous.[11] However, the Court of Appeals concluded that it was free to examine *de novo* questions of disclosure in RST's explanatory materials, that

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[11] In its initial opinion following trial, the District Court had held that the trial record could not support an assessment of damages. (App. 222) However, even though respondent had rested his case and the parties had stipulated to a single court trial of all issues, including damages, the court subsequently ordered supplementary evidentiary hearings on such issues as damages and alternative forms of relief. (App. 227-45) The Court of Appeals unanimously reversed this order for additional hearings on the ground that the District Court was precluded from assessing damages by the Zambian court's finding that the terms of the reorganization were fair, and the alternative form of equitable relief which the District Court proposed to consider was "far removed from business reality." (App. 23-25, 94-98)

Rule 10b-5 had been violated in certain respects, and that the rescission remedy ordered by the District Court was appropriate. Judge Adams dissented and would have dismissed the complaint.

Reasons for Granting the Petition

I. The decision below rests upon the erroneous concept that a reorganization of a foreign corporation consummated by competent judicial authority is subject to subsequent modification under this country's laws and in its courts.

Prior to its nationalization, RST was a major Anglo-African business enterprise in which individual United States citizens, as well as nationals of many other countries, had chosen to invest over the years. It was one of Africa's largest industrial enterprises and one of the two companies which formed the backbone of the Zambian economy.

RST's internal affairs, including particularly such matters as the rights of shareholders with respect to its capital structure, are acknowledged by all common law legal systems to be governed by the law of Zambia, its corporate domicile. *E.g., Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130 (1932); *Second Russian Ins. Co. v. Miller*, 268 U.S. 552, 560 (1925); *Canada Southern Ry. v. Gebhard*, 109 U.S. 527 (1883); *Hausman v. Buckley*, 299 F.2d 696, 702-03 (2d Cir.) (Marshall, J.), *cert. denied*, 369 U.S. 885 (1962); Leflar, *American Conflicts Law* §§ 58, 253-55 (1968); *Restatement Second of Conflict of Laws* § 313, comment *e* (1971); Gower, *Principles of Modern Company Law* 671-72, 676 (3rd ed. 1969).

Zambia's jurisdiction to provide for RST's reorganization pursuant to its law is indisputable, and the propriety of the Zambian court's procedures has not been challenged. The Zambian decree which approved the reorganization and directed its consummation was entered after a hearing of which respondent had due notice and in which he had the right to participate. Moreover, all of respondent's contentions with respect to the explanatory materials were before the Zambian court, as was the entire record of the District Court proceeding, including the transcript of the three preliminary injunction hearings, respondent's pleadings and briefs, and respondent's letter to the shareholders.

It is uncontradicted as a principle of governing law that the High Court of Zambia necessarily passed upon the adequacy of the RST explanatory materials. Similarly, the trial record established beyond dispute that the standard by which the Zambian court measured the adequacy of these explanatory materials is entirely consistent with the standards imposed in this country by Section 10(b) of the Exchange Act and Rule 10b-5.[12] The test under Zambian and English law alike is this: Did the explanatory materials fairly and "as far as possible, give all the information reasonably necessary to enable the recipients to determine how to vote?"[13]

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[12] The opinions of both a Zambian and an English barrister were introduced at the trial and never impeached. These opinions, one of which deals with the Zambian court's review of the RST explanatory materials, are reproduced in the Joint Appendix in the Court of Appeals at 1048a-51a and 1057a-63a.

[13] *In re Dorman, Long & Co., Ltd.* [1934] Ch. 635, 657; *see id.*, at 666 ("such a statement of all the main facts as will enable them to exercise their judgment"); *In re Old Silkstone Collieries, Ltd.* [1954] Ch. 169, 191-92 (C.A.); *see Carruth v. Imperial Chemical Industries, Ltd.* [1937] A. C. 707, 727, 739–40 (H.L.)

It is also indisputable that under Zambian law, the reorganization decree is binding on all shareholders and immune from any attack, whether based on alleged deficiencies in the explanatory materials or otherwise. Zambia Companies Ord. § 19(4); English Companies Act of 1948, 11 and 12 Geo. 6, ch. 38, § 69(4); *Re Walker & Smith Ltd.* 88 L.T.R. 792 (Ch. 1903); *Ladies Dress Assn. Ltd. v. Pullbrook* [1900] 2 Q.B. 376; *Walker v. Peterson* [1933] S. Af. L. Rep. 23 (App. Div.); *cf. Nicholl v. Eberhardt Co.* 61 L. T.R. (n.s.) 489 (C. A. 1889); *see also Carl Zeiss Stiftung v. Rayner & Keller Ltd. No. 2* [1967] A.C. 853 (H.L.); *Hoystead v. Commissioner of Taxation* [1926] A.C. 155 (P.C.) (Aust.)[14]

While the Court of Appeals recognized that the Zambian judgment was dispositive and conclusive of respondent's claims that the terms of the reorganization were unfair, it nevertheless held that questions of disclosure to shareholders "do not relate to the terms of the merger and thus do not impinge upon our ruling giving effect to the fairness finding of the Zambian decree." (App. 24)

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[14] Within the United States itself, a similar judicially-approved corporate reorganization pursuant to the Public Utility Holding Company Act of 1935 binds all creditors and shareholders to the terms of the approved plan after due notice, whether or not they participate actively in its formulation. No shareholder may forego a direct appeal from such a reorganization decree and instead bring a collateral attack which attempts to invoke some different body of law as a basis for modifying its terms. *Nichols v. Alker*, 231 F.2d 68 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956); *cf. King v. Realty Mortgage Co.*, 107 F.2d 90 (5th Cir. 1939), *cert. denied*, 309 U.S. 673 (1940); *see also Chicot County District v. Baxter State Bank*, 308 U.S. 371, 375 (1940). Delaware law includes a corporate reorganization procedure which is drawn from the same English sources as the Zambian reduction of capital proceeding and is very similar to it. 4 DEL. CODE ANN. tit. 8, § 102(b) (2) (1967).

Because of supposed flaws in disclosure, the Court of Appeals went on to sanction the form of rescission ordered by the District Court, which would give each former RST shareholder—foreign as well as American—the right, in effect, to reverse the RST reorganization as to his own RST shares. The decision below thus aborts the very reorganization decree which it found entitled to recognition.

Even if it be true that questions of disclosure do not impinge upon the terms of the merger, the relief which the Court of Appeals sanctioned did so impinge. The form of rescission ordered by the District Court would directly and immediately interfere with and frustrate the very judicially-decreed reorganization which the Court of Appeals held to be binding and conclusive.

The Court of Appeals tacitly assumed, however, that this Court's decision in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), required that the District Court review the adequacy of RST's explanatory materials under American law, notwithstanding the Zambian judicial proceeding and reorganization decree and despite the inapplicability of United States proxy rules.[15] But *Mills*, of course, dealt only with the application of the SEC's proxy rules to materials distributed by an American corporation and did not involve in any way the recognition of a foreign reorganization decree.

Nothing in *Mills* suggests in the slightest that Section 27 of the Exchange Act, which gives United States District Courts exclusive jurisdiction over Exchange Act claims, was intended to repudiate a fundamental principle of

[15] As discussed in note 7, page 9, *supra*, the courts below disregarded the express exemption of RST's explanatory materials from the proxy rules promulgated under Section 14(a).

private international law as applied by this Court: a foreign corporate reorganization decree accomplished by lawful authority of the state of incorporation is as conclusive in the courts of the United States as it is in the courts of the nation under whose laws it was rendered.

This Court has held that not even an American *creditor* may later contest a foreign corporate reorganization which treats United States citizens equally with aliens. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527 (1883). As this Court has further expressly recognized, if American creditors are bound by such a reorganization, *a fortiori*, all American shareholders or "members" of the foreign corporation likewise are bound. *Second Russian Ins. Co. v. Miller*, 268 U.S. 552, 560 (1925); *see Modern Woodmen of America v. Mixer*, 267 U.S. 544, 551 (1925); *cf. Hilton v. Guyot*, 159 U.S. 113 (1895).

The approach taken in the decisions below also conflicts with general concepts of international legal and commercial relations only recently restated by this Court in *M/S Bremen v. Zapata Off-Shore Co.*, No. 71-322, (June 12, 1972):

> "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts."

If the decision below is permitted to stand, this nation will be committed to the narrow and wholly disruptive concept that when American shareholders choose to invest in

a foreign corporation, American courts will apply American law to that corporation's internal affairs, even to the extent of disregarding a reorganization decree duly entered by a court of the corporation's domicile, after affording all shareholders notice and an opportunity to be heard.

The Congress and the executive branch of our government have fashioned in the national interest a policy of facilitating an international flow of investment capital and particularly of encouraging newly independent nations to welcome private as well as public forms of development assistance. *See, e.g.*, Foreign Assistance Act of 1969, 22 U.S.C. §§ 2191, *et seq.; cf.* Statement by President Nixon, 66 Dept. of State Bull. No. 1702, at 152 (1972). That national policy will be seriously impaired if our courts require that private United States dollars invested abroad carry with them preemptive United States jurisdiction over the internal affairs of any foreign corporation which thereby acquires American shareholders.

II. The decision below erroneously holds that Rule 10b-5 imposes liability in the absence of culpable misconduct by a defendant and reliance by the injured party, even as to a foreign corporation's shareholder communications not subject to United States proxy regulations.

Having determined that the RST explanatory materials could be attacked under Rule 10b-5 despite the Zambian decree and the exemption of the materials from the SEC's proxy rules,[16] the Court of Appeals held the materials defective in two basic respects. First, the Court held that the

[16] *See* note 7, page 9, *supra*.

materials failed to explain adequately the reasons for presenting nationalization and simultaneous externalization for approval by shareholders as a single proposal. Second, the Court of Appeals affirmed in certain respects the District Court's findings that certain facts, although explicitly disclosed, were insufficiently highlighted and therefore "buried".

Both sets of holdings are erroneous, since every statement made by RST in the explanatory materials was true and the details supposedly omitted or buried were in any event immaterial. (*See* App. 65-83) More fundamental, however, is the fact that the decisions below posit liability even though there is no evidence or finding of fraud or advertent misconduct by anyone.[17]

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[17] The Court of Appeals majority said that the RST explanatory materials "suggest" that a "studied effort" was made "to avoid stating explicitly" that nationalization and amalgamation, on the terms specified by the explanatory materials, were either "absolutely independent" or "absolutely interdependent." (App. 11) In fact, neither "absolute" assertion could have been made. (*See* App. 67-68, 72-73) In any event, only in that technical sense was "fraud" found. This was not a finding of advertent misconduct, but rather the expression of a conclusion that any defect in a proxy statement deemed by a court to be material is a violation of Rule 10b-5 and, hence, "fraud." As Judge Adams cogently observed in his dissenting opinion (App. 67), if the linking of the two events was in fact an accurate description of their relationship, it would have been foolhardy and most unwise for RST, a Zambian corporation, to have gone further by elaborating in its proxy materials that the linkage was politically necesssary because it questioned the stability and good faith of the Zambian Government. Still further, such a gratuitous discussion of the risks inherent in separating nationalization and externalization, even if politically feasible, undoubtedly would have served only to panic the shareholders into supporting the proposed reorganization because of the incalculably more hazardous alternatives. (App. 68)

Moreover, the RST shareholders had knowledge or notice, prior to the vote on the reorganization, of the matters now complained of as omitted or buried. Consequently, no RST shareholder could have reasonably relied upon any of the alleged omissions.

As Judge Adams said in his dissent,

> "[I]t appears that Congress intended to grant a private action for damages suffered as a result of 'illicit practices,' consisting of 'manipulative and deceptive practices which have been demonstrated to fulfill no useful function.' Essential to the elements intended by Congress are the requirements that the defendant has acted in other than 'good faith' and that the plaintiff has 'relied' on the misleading statement. Nowhere in the Senate Report is there a manifestation of an intent by Congress to provide a cause of action based on either mere negligence or liability without fault. There is no evidence that Congress intended that under Section 10(b) anyone should be an insurer against false or misleading statements made non-negligently or in good faith.
>
> "It seems clear from the discussion of the legislative history of Section 10(b) and the administrative history of Rule 10b-5 that Congress and the SEC both intended, before any liability for misrepresentation might attach, that the element of culpability be present. This intent was manifested by the constant usage of words such as 'cunning,' 'manipulative,' 'deceptive,' 'fraudulent,' 'illicit,' 'fraud,' and lack of 'good faith,' and the absence of language indicating liability for negligent or non-negligent conduct. The inquiry then becomes whether courts have construed the language of the statute and rule so as to obviate the requirement of culpability that Congress and the SEC apparently contemplated." (App. 44)

Judge Adams' analysis of the cases (App. 45-58) discloses that the federal courts have in general posited liability in private actions under Rule 10b-5 upon proof of actual fraud or at least some form of advertent misconduct.[18]

Nevertheless, because of the varying approaches which have been taken, this question continues to pose perhaps the most important unresolved issue in federal securities litigation, contributing to uncertainty in many hundreds of pending cases.

The present case is an appropriate one for development of a sensible standard of liability in private litigation under Rule 10b-5. As Judge Adams' dissent cogently elaborates, the Court of Appeals majority predicated liability upon, at worst, a hindsight preference for somewhat different treatment of highly complex and delicate matters involving relationships with a newly independent nation. We urge that hindsight preference in the treatment of such matters is not and should not be treated automatically as "fraud" within the meaning of Rule 10b-5.

This petition presents a second question of great importance under Rule 10b-5: must a private litigant prove his reliance upon a misrepresentation in order to recover?

In the present case, respondent was designated a class representative *prior* to the distribution of RST's explanatory materials; and in such capacity he prepared a letter to

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[18] Although analysis reveals that the decisions uniformly rest upon evidence of some type of knowing misconduct, the language used differs within the circuits. Thus opinions of the Seventh, Eighth, Ninth and Tenth Circuits contain statements which on their face purport to eliminate the need for *scienter* in a private Rule 10b-5 action, while the Third and the Fifth Circuits expressly require a finding of advertent misconduct; the Second Circuit has not yet taken a clear position on the question. (App. 55)

RST's shareholders which was distributed with the explanatory materials. Respondent's letter attacked specifically the alleged major defects in the materials which were later found to be violations of Rule 10b-5. Thus every shareholder had actual knowledge or notice of the most significant facts said to have been omitted or "buried" by RST. The reasonable shareholder could not have ignored the statements of his class representative and could not have relied instead upon the RST materials without regard for respondent's accompanying letter.

The Court of Appeals majority, however, held that the absence of reliance was of no legal consequence, once again invoking the inapplicable American proxy rules. (App. 15-16) As Judge Adams said in response:

> "Where the class has been alerted to the misleading or false nature of the proxy statement by a letter written by its attorney and enclosed with the proxy statement, what duty is imposed upon reasonable shareholders to look for allegedly 'buried facts' highlighted by that letter before it may be said, as a matter of law, that they relied on the non-effective disclosure of such facts? To pose this question would appear to answer it. Reasonable shareholders, when given notice by their attorney and representative that the proxy materials are erroneous or misleading, would at least read such materials closely, and if a careful review of the proxy statement and its appendices would reveal any buried facts, the shareholders should be precluded from asserting that they

relied on the non-existence of such facts.* A different result might be ordained where the allegedly 'buried facts' were so artfully concealed that the ordinary shareholder could not discover them, or where they constitute an integral part of a manipulative scheme to defraud. However, there is no such finding here, nor even any suggestion that such conduct occurred." (App. 63-64)

III. The decision below misapplies *Mills* by holding that it automatically mandates Draconian relief for any violation of Rule 10b-5, without regard for the equities of a particular case.

The decision of the Court of Appeals orders Amax to undo the RST reorganization by making a tender offer which would deprive Amax of a significant benefit for which an admittedly fair price was paid: undivided ownership of the RST assets remaining after a substantially pro rata distribution of RST's assets.

This drastic revision of the Zambian court's reorganization decree was ordered despite prior rejection of respondent's non-disclosure claims by the Zambian court, the express exemption of RST's explanatory materials from the United States proxy rules, the absence of any evidence

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"* The majority attempts to minimize the element of reliance by application of the principle that a defective proxy statement cannot be cured by reference to materials submitted to shareholders by other parties to a proxy fight. I have no quarrel with this rule as applied to cases brought under Section 14a to insure complete and accurate proxy statements. But that rule has no application to a 10b action seeking damages where the issues are whether the plaintiffs did in fact rely, or were in fact misled, and the plaintiffs had knowledge of, or were alerted to, the important facts in question."

of advertent misconduct, the improbability that any shareholder was in fact misled, and despite recognition of the Zambian court's determination that the reorganization was fair to all of RST's shareholders.

Nevertheless, the Court of Appeals deemed itself "obligated to provide a remedy" and concluded that *Mills* dictated a drastic one, lest "the Congressional policy implicit in federal securities regulation . . . be seriously frustrated." (App. 24)

In *Mills*, this Court said that a holding of liability "implies nothing about the form of relief" and emphasized that in "devising retrospective relief" for proxy rule violations, "the lower courts should exercise ' "the sound discretion which guides the determinations of courts of equity," ' keeping in mind the role of equity as the 'instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' " 396 U.S., at 386. Finally, the Court expressly recognized that even after establishing a violation, plaintiffs may not necessarily be "successful in showing a need for significant relief." *See id.* at 396.

We submit that the rigid standard applied by the Court of Appeals is in direct conflict with *Mills*, which directed a flexible and equitable approach to remedies under the Exchange Act, and that the present case poses an extreme example of a situation in which Draconian relief is singularly inappropriate.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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Of Counsel.

July 24, 1972

APPENDIX

Order of the High Court of Zambia, June 9, 1970

IN THE
HIGH COURT FOR ZAMBIA

AT THE PRINCIPAL REGISTRY

BEFORE THE DEPUTY REGISTRAR IN CHAMBERS
THIS 9TH DAY OF JUNE 1970

In the Matter of

SECTION 15 OF THE COMPANIES ORDINANCE

and

In the Matter of

ROAN SELECTION TRUST LIMITED

ORDER

UPON THE APPLICATION by Originating Summons dated the 5th day of June 1970 of the above named Roan Selection Trust Limited whose registered office is situate at Mpelembe House, Broadway, Ndola, Zambia;

AND UPON HEARING the Solicitors for the Applicant;

AND UPON READING the said Originating Summons, the affidavit of JEAN VUILLEQUEZ filed the 5th day of June 1970 and the exhibits in the said affidavit referred to therein;

IT IS ORDERED that the Petition to be preferred unto the Court by the Applicant pursuant to Section 15 of the Com-

panies Ordinance to confirm a proposed reduction of the capital of the Applicant be placed in the paper for hearing before a Judge of the High Court for Zambia, Lusaka on Friday the 14th day of August 1970 when any creditor or shareholder of the said Company who desires to object may attend and be heard Provided that:

(1) a Special Resolution to reduce the share capital of the Applicant shall have been duly passed by its members;

(2) the said Petition shall have been duly preferred to the Court together with such evidence in support thereof as the Court may deem satisfactory; and

(3) the Applicant shall have caused such Notice of the presentation of the said Petition and of the said day fixed for the hearing thereof to have been advertised as the Court may require;

IT IS FURTHER ORDERED that the Applicant be at liberty to apply.

This order was taken up by Messrs. Ellis & Co., of Farmers' House, Cairo Road, Lusaka, Solicitors for Roan Selection Trust Limited.

[Seal of the High Court for Zambia—
Dated 9 June 1970]

Order Confirming Reorganization, August 14, 1970

IN THE
HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
BEFORE MR. JUSTICE MAGNUS IN COURT
FRIDAY THE 14TH DAY OF AUGUST 1970

In the Matter of
THE COMPANIES ORDINANCE
and
In the Matter of
ROAN SELECTION TRUST LIMITED

ORDER

UPON THE PETITION of the above named Roan Selection Trust Limited (hereinafter called "the Company") whose registered office is situate at Mpelembe House, Broadway, Ndola, Zambia on the 6th August 1970 preferred unto this Court

AND UPON HEARING Counsel for the Company

AND UPON READING the said Petition the Order dated the 9th June 1970 (whereby it was ordered subject to the provisions thereof that the said Petition be placed in the paper for hearing on the 14th August 1970) the Order dated the 6th August 1970 (whereby it was ordered that sub-

sections (1) (2) and (3) of section 17(2) of the above mentioned Ordinance should not apply as regards any class of creditors of the said Company) the "Times of Zambia" (Zambia) "The Times" (United Kingdom) and "The New York Times" (United States of America) newspapers of the 7th August 1970 and the "Rand Daily Mail" (South Africa) newspaper of the 8th August 1970 (each containing a notice of the presentation of the said Petition and that the same was appointed to be heard this day) the Affidavit of Ivor Gordon Kennington the Affidavit of W. Richard Bingham the Affidavit of Richard S. Simmons and the Affidavit of Robert E. Murray all filed the 5th August 1970 the Affidavit of Sir Ronald Lindsay Prain filed 6th August 1970 the Affidavit of Robert Hurst Page the further two Affidavits of Richard S. Simmons and the Affidavit of Robert E. Murray all filed the 14th August 1970 and the exhibits in the said Affidavits or some of them respectively referred to and having heard the oral evidence of Richard Sheridan Simmons and Wheelook Richard Bingham

AND THE COURT being of opinion that the reduction of capital of the Company hereinafter referred to is fair and reasonable to all the shareholders of the Company

THIS COURT DOTH ORDER THAT the reduction of the capital of the said Company from £100,000,000 to £49,222,264 resolved on and effected by a Special Resolution passed at an Extraordinary General Meeting of the said Company held on the 6th August 1970 be and the same is hereby confirmed in accordance with the provisions of the above mentioned Ordinance

Order Confirming Reorganization, August 14, 1970

AND THE COURT DOTH HEREBY APPROVE the Minute set forth in the Schedule hereto

AND IT IS ORDERED that this Order be forthwith produced to the Registrar of Companies and that an Office Copy thereof be delivered to him together with a copy of the said Minute

AND IT IS ORDERED that notice of the registration by the Registrar of Companies of this Order and of the said Minute be published once in the "Times of Zambia" (Zambia) "The Times" (United Kingdom) "The New York Times" (United States of America) and the "Rand Daily Mail" (South Africa) newspapers within 21 days after such registration liberty to apply

This Order was taken up by Messrs. Ellis & Co. of Farmere House, Cairo Road, Lusaka Solicitors for Roan Selection Trust Limited

The Schedule before referred to Minute approved by the Court

"The capital of Roan Selection Trust Limited was by virtue of a Special Resolution and with the sanction of an Order of the High Court dated the 14th August 1970 reduced from £100,000,000 divided into 50,000,000 shares of £2 each to £49,222,264 divided into 24,611,132 shares of £2 each. At the date of the registration of this Minute 18,606,-958 of the said shares have been issued and are deemed to be fully paid up and the remaining shares are unissued".

Text of Statutes and Rules Involved

ZAMBIA COMPANIES ORDINANCE

14. (1) Subject to confirmation by the Court, a company if so authorised by its articles of association as originally framed or as amended by special resolution, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(c) either with or without extinguishing or reducing the liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company;

and may, if and so far as is necessary, alter its memorandum of association by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Ordinance called a resolution for reducing share capital.

15. Where a company has passed a resolution for reducing share capital, it may apply to the Court by petition for an order confirming the reduction.

16. On and from the confirmation by a company of a resolution for reducing share capital, or where the reduction

does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, then on and from the presentation of the petition for confirming the reduction the company shall add to its name, until such date as the Court may fix, the words 'and reduced' as the last words in its name and those words shall until that date be deemed to be part of the name of the company:

Provided that where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words 'and reduced'.

17. (1) Where the proposed reduction of share capital involves either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain as far as possible without requiring an application from any creditor the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

(3) Where a creditor entered on the list, whose debt or claim is not discharged or determined, does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing the payment of his debt or claim by appropriating, as the Court may direct, the following amount, that is to say—

(a) if the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim:

(b) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

18. The Court, if satisfied with respect to every creditor of the company who under this Ordinance is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

19. (1) The Registrar, on production to him of an order of the Court confirming the reduction of the share capital of a company, and the delivery to him of a copy of the order and of a minute (approved by the Court) showing, with respect to the share capital of the company as altered by the order, the amount of such capital, the num-

ber of shares into which it is to be divided, the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute.

(2) On the registration, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3) Notice of the registration shall be published in such manner as the Court may direct.

(4) The Registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Ordinance with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

* * *

104. (1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members as being entitled so to do, vote in person or, where proxies are allowed, by proxy, at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2) A resolution shall be a special resolution when it has been passed by such majority as is required for the passing of an extraordinary resolution and at a general

meeting of which not less than twenty-one days' notice, specifying the intention to propose the resolution as a special resolution, has been duly given:

Provided that, if it is so agreed by a majority in number of the members having the right to attend and vote at any such meeting, being a majority together holding not less than ninety-five per centum in nominal value of the shares giving that right, or, in the case of a company not having a share capital, together representing not less than ninety-five per centum of the total voting rights at that meeting of all the members, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given.

(3) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed, a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) In computing the majority on a poll demanded on the question that an extraordinary resolution or a special resolution be passed, reference shall be had to the number of votes cast for and against the resolution.

(5) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by this Ordinance or the articles.

Text of Statutes and Rules Involved

SECURITIES EXCHANGE ACT OF 1934

§ 3. (a) When used in this title, unless the context otherwise requires—

* * *

(12) The term "exempted security" or "exempted securities" shall include . . . such other securities . . . as the Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or for stated periods, exempt from the operations of any one or more provisions of this title which by their terms do not apply to an "exempted security" or to "exempted securities."

* * *

§ 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

Text of Statutes and Rules Involved

§ 14. (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

* * *

§ 27. The district courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. . . .

Text of Statutes and Rules Involved

SEC SECURITIES EXCHANGE ACT RULES

RULE 3a12-3. EXEMPTIONS FROM SECTIONS 14 AND 16 FOR SECURITIES OF CERTAIN FOREIGN ISSUERS

* * *

(b) Securities for which the filing of registration statements on Form 20 is authorized shall be exempt from the operation of Sections 14 and 16 of the Act except that this paragraph shall not apply if at the end of the last fiscal year of the issuer (i) more than 50 per cent of the outstanding voting securities of the issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States, and (ii) the business of such issuer is administered principally in the United States or 50 per cent or more of the members of the Board of Directors are residents of the United States. For the purpose of this paragraph the term "resident," as applied to security holders, shall mean any person whose address appears on the records of the issuer, the voting trustee or the depositary as being located in the United States.

* * *

RULE 10b-5. EMPLOYMENT OF MANIPULATIVE AND DECEPTIVE DEVICES

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

(a) to employ any device, scheme or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

SEC FORM 20

This form shall be used for registration pursuant to section 12 of the Securities Exchange Act of 1934 of any foreign private issuer: *Provided*, That it shall not be used for registration of any class of securities of any North American or Cuban issuer . . .